Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Rafael Náter,

Petitioner

v.

Richard Riley, Secretary of the Department of Education,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Rafael Náter, *Pro-se Petitioner*
31 Zuania,
Parque de Villa Caparra,
Guaynabo, Puerto Rico 00966
(787) 781-4089

7328

Petition For Writ Of Certiorari.

a) Questions Respectfully Presented For Review.

I. (a) Whether the Court erred by dismissing 5 of the 6 personnel actions, this in conflict with our sister 9th Circuit decision, and (b) by dismissing the "Puerto Rico claims".

II. Whether the Court erred finding no prima facie case of discrimination.

III. (a) Whether the Court erred by granting summary judgement for Respondent, and (b) by transferring to the Federal Circuit Court the alleged violations to the Whistleblower Protection Act.

b) Parties To The Proceeding. All parties to the proceeding are included in the caption. No corporate disclosure statement is require.

Petitioner is: Rafael Náter, pro-se
#31 Zuania, Parque de Villa Caparra
Guaynabo, Puerto Rico 00966.
Tel. (787) 781-4089.

Respondent is: Richard Riley, Secretary
United States Department of Education

[1] represented by:
The Solicitor General of the United States
Room 5614, Department of Justice
Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Note: Following with rule #29.4 of this court, the documents will be serve on the Solicitor General of the United States. Nevertheless, a "Courtesy Notice" will be serve on the representative at the lower courts: Mr. Guillermo Gil, A.U.S.A., and Mr. Fidel Sevillano Del Río, A.U.S.A. at their respective addresses.

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[1] The agency's attorney. Anthonier White. Esq., represented the agency for all practical purposes before the Board and before the Circuit and the District Court for Puerto Rico - District case 99-1366 (JP). Address is: U.S. Education OGC division, 600 Independence Ave., S.W., Room 4200. Washington. D.C. 20202-2110. Tel. (202) 401-6700. The official attorney before the District Court was Mr. Fidel Sevillano Del Río, AUSA. Address: Federal Office Building, Room 452, Carlos Chardón street, #150, Hato Rey, Puerto Rico 00918. Tel. (787) 282-1844.

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(i) Decision by the Merit Systems Protection Board (MSPB or the Board); issued by the Board on December 18, 1997, docket: NY-1221-97-0334-W-1; disposition: Corrective action was denied.
(ii) Order by the Board; issued on May 12, 1998, docket: NY-1221-98-0272-S-1; disposition: Stay Request is denied.
(iii) Order by the Board issued on November 3, 1998, docket: NY-1221-97-0334-W-1; disposition: Petition For Review was denied.
(iv) Order by the Board; issued on November 23, 1998, docket: NY-1221-98-0401-W-1; disposition: Request for Hearing is denied; the Board lacked jurisdiction.
(v) Decision by the Board; issued on December 31, 1998, docket: NY-1221-98-0401-W-1; disposition: Dismissed; lack of jurisdiction.
(vi) Decision by the Board; issued on March 2, 1999, docket: NY-1221-98-0272-W-1; disposition: Dismissed; lack of jurisdiction.
(vii) Decision by the Board; issued on March 18, 1999, docket: NY-0752-98-0297-I-1; disposition: The Board agreed the employee reported irregularities under the Whistleblower Protection Act, 103 Stat 16, but rejected these reports triggered his removal from the agency. Also, found not a Prima Facie case of national origin discrimination. Corrective action: denied.
(viii) Opinion and judgement of the United States Court of Appeals For The Federal Circuit (Fed. Cir.); issued by the Federal Circuit court on May 9, 2000, docket: 99-3083, 3143, -3213; disposition: The Board decisions were Affirmed.
(ix) Order of the Fed. Cir.; issued on July 6, 2000, docket: 99-3083, 3143, -3213; disposition: Rehearing Denied.
(x) Opinion, Order, and Final Judgement by the United States District Court For The District of Puerto Rico; issued on September 14, 2000, docket 99-1366; disposition: In essence, Five of Six administrative cases were dismissed, with the case

reviewing the claims of removal based on Whistleblowing and Discrimination, was broken to Return the Whistleblowing claim to the Federal Circuit, and Dismisses the Discrimination claim.
(xi) Order by This Honorable Supreme Court of the United States of America; issued on November 27, 2000, docket 00-531. Disposition: Petition For Writ of Certiorari Denied.
(xii) Order by the United States Court of Appeals For The First Circuit (1st Cir.); issued on July 23, 2001, docket 00-2348. Disposition: The District Court order of September 14, 2000, was Sustained.
(xiii) Order by the 1st Cir.; issued on December 4, 2001, docket 00-2348. Disposition: Rehearing Denied.
(xiv) Federal Circuit case 00-1589 is stayed until this Honorable Court decision on the case at bar.

e) Jurisdiction Of The Supreme Court.

On September 13, 2000, the District Court of Puerto Rico (from now on the District) issued an Opinion (summary judgement) and Order with a Final Judgement *(please, see appendix pp. 1 to 28)*. In that order, in essence, the District Court dismissed five of the six personnel action under review on grounds of lack of subject matter jurisdiction, returned-transferred to the Fed. Cir. Case 00-3236 (now under Fed. Cir. docket #00-1589, which is now "stayed" pending the decision on this case) and dismissed the discrimination-EEO complaint and other causes of actions. Alternatively, the District Court granted Respondent's request for summary judgement. Petitioner appealed to the 1st Cir.

Please note that:

(A) Original Judgement by the United States Court of Appeals was issued on July 23, 2001. See *appendix p. 29*.
(B) A timely petition for rehearing was denied on December 4, 2001; see copy at *appendix 32*.

Petitioner believes this Honorable Court has jurisdiction as authorized by our Constitution, U.S. Const. art. III, §2, and per the statutory provisions under 28 U.S.C. §1254(1).

f) Constitutional And Statutory or Regulatory Provisions Involved.
We believe there is an important regulatory provision involved: 5 C.F.R. 1614.302(b): Equal Employment Opportunity Commission, Federal Sector, Subpart C - Related Processes: *Mixed Case Complaints*. Subsection (b) establishes the process to follow by the employee and by the agency.

g) Statement Of The Case.

This is a labor related case. The employee alleged the employing agency discriminated against him and took reprisal by adopting six personnel actions also because his Whistleblowing activities. It is, since Petitioner alleged discriminatory practices and violations to the Civil Service laws, then, this is a case of "mix" allegations.

How did we get to this Honorable Court? Plaintiff-Petitioner, Rafael Náter, working as auditor for the Defendant-Respondent, the U.S. Department of Education (the Agency), filed a "mix complaint" (29 C.F.R. 1614.106) on October 14, 1994, alleging he suffered two prohibited personnel actions (*appendix p. 33*). Agency case ED-9501000. A mix complaint refers to claims of discrimination with violations to the civil service laws; see 29 C.F.R. 1614.302.

Due to the agency inaction, and after 120 days lapsed, and following with 29 C.F.R. §1614.302, §1614.108(e), and 5 C.F.R. §1201.151 and §1201.154(b), on April 20, 1996, he resorted to the Merit Systems Protection Board (MSPB or the Board, docket NY-1221-96-0334-W-1). A jurisdictional hearing was held on November 14, 1996 (*appendix p. 35)*. The Board issued the Initial Decision (ID) on December 18, 1997: lack of jurisdiction. With Board's permission, on February 23, 1998, Náter filed Petition For Review. The Board Final Decision was not to review: November 3, 1998.[2]

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[2] Petitioner filed with the Equal Employment Opportunity Commission (EEOC) and with the U.S. Court of Appeals for the Federal Circuit on November 19, 1998. Petitioner asked the EEOC to review the claims of discrimination (5 U.S.C. 7702(b)(1)) and the Cir. the non-discrimination issues (5 U.S.C. 7703(b). The EEOC Denied Consideration per letter received on March 10, 1999, and we filed Civil Action in District Court for the District of Puerto Rico on April 6, 1999.

After October 1994, the agency adopted three other personnel actions against Petitioner which he grieved. On February 27, 1998, the agency removed him from his job. On March 26, 1998, he appealed to the Board[3] claiming he suffered four prohibited personnel actions - another "Mix case".

In sum, the Board *did not review the merits of the claims* related to five of the six prohibited personnel actions; but it did so on the removal action: Board docket NY-0752-98-0297-I-1. Judicial review of Board decision is ruled by 5 U.S.C. 7703, but, if discrimination is included, the review is per §7703(b)(2) and shall be file as provided under 42 U.S.C. 2000e-16(c) which ultimately provides for filing in District Court.

Petitioner filed Civil Action with the District Court on April 16, 1999. Then, on July 14, 2000, the District issued an order denying Petitioner's discovery request for certain information; we appealed (00-2058), but the 1st Cir. dismissed as Interlocutory appeal. Then, docketed on September 14, 2000, the District Court of Puerto Rico issued an Opinion and Order with a Final Judgement. The District dismissed five of the six personnel action in the basis of lack of subject matter jurisdiction, returned-transferred to the Fed. Cir. case 00-3236 (now under Fed. Cir. docket #00-1589, which is "stayed" pending the decision on this case) and dismissed the EEO complaint and other causes of actions; alternatively, the District granted Respondent's request for summary judgement.

h) Reasons For Granting The Writ.

There is a probable conflict between the implementation of the law and rules in proceedings in mix cases by our sister Circuit in

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[3] The Board, in essence, broke this second appeal into three appeals. Of these, one included the claim of two personnel action (NY-1221-98-*0272*-W-1) with the Stay Request, other included the claim of one personnel action (NY-1221-98-*0401*-W-1), and the last included the dismissal of the Petitioner ((NY-0752-98-*0297*-I-1). For the ...0272... case the ID was dated March 2, 1999; for the second (...0401...), it was dated December 31, 1998, and for the third (...0297...), it was dated March 18, 1999.

Sloan v. West, 140 F. 3d 1255 (9th Cir. 1998) and by our Honorable 1st Circuit Court in this case.

ARGUMENTS

I-a. The lower Court erred by dismissing 5 of the 6 personnel actions, all of which included "mix" allegations, because this dismissal is contrary to the law, regulations as it is in conflict with our sister Circuit interpretation. The norm requires the agency and the Board to notify the employee to re-file with the Respondent's EEO division.

Legal Standard. "... If a person files a timely appeal with the Board from the agency's processing of a mix case complaint and the Board dismisses it for jurisdictional reasons, the agency shall reissue a notice under §1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.". See 29 C.F.R. 1614.302(b).

Discussion. Contrary to the requirements under 29 C.F.R. 1614.302(b), and per the judicial interpretation established by the 9th Circuit in *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998), the Respondent and the Board failed to notify Petitioner of his right to re-file his EEO claims after the Board dismissed his "mix allegations" due to lack of jurisdiction. This inaction by the Board and the agency caused the Petitioner to miss his opportunity for filing the discrimination claim with the EEO division of the agency.

Our sister Circuit made the following interpretation of this rule:

"... [4] ... Ordinarily, if the Board finds it lacks jurisdiction over the entire case or over one of the claims, it will dismiss the complaint and/or claims; advise the employee to seek appropriate review of any extra-jurisdictional nondiscriminating claims through other channels within the agency; and advise the employee to pursue any discrimination claims by filing a compliant with the agency EEO and otherwise exhausting administrative remedies pursuant to Title VII. 29 C.F.R. 1614.

302(b)(1997)...", *Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998).

Because the employee was not informed to fiel with the agency's EEO division, he filed with the District Court. The Court dismissed five of the six personnel actions at issue on grounds of lack of subject matter jurisdiction. See *appendix p. 10 to 17*. It is, judicially it has been determined that a case of "mix" allegations is not a mix case *appeal* until the Board review both allegations; i.e., the appealable action to the Board (from now on the *non-EEO issue*) and the "pendent" jurisdiction action (the *EEO-issue*). See *Ballentine v. Merit Systems Protection Bd.*, 738 F.2d 1244, 1246 last ¶ (Fed. Cir. 1984), and *Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir. 1998).

In our case, Petitioner first filed with the agency's EEO division, and after the required 120 days, he filed with the Board (see 29 C.F.R. 1614.302(d)(1)(i)). Therefore, Appellant exhausted all administrative remedies. However, neither the Board nor the Respondent informed him to re-file the EEO issuesnot reviewed by the Board with the agency's EEO division as it is required *under 29 C.F.R. 1614.302(b)*. See *appendix p. 14, 2nd* ¶. Thereafter, he filed with the EEO Commission and with the Fed. Cir. asking each to resolve the subjects of their "expertise". Also, he notified both of these forums that he filed with each other and about his believes and intentions to obtain redress related to both the EEO and non-EEO issues. Finally, Petitioner filed with the District Court[4]. The District Court, however, dismissed with prejudice to re-file five of the six actions base on lack of subject matter jurisdiction. We pose the Court should have ordered the agency and the Board to comply with requirements under 29 C.F.R. 1614.302(b) since each of these actions relates to mix allegations. The Court noted Petitioner

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[4] In this analysis we considered that judicial review of Board decisions is governed under 5 U.S.C. 7703, thus, generally, the appeal is to the Federal Circuit. But, under §7703(b)(2), the Fed. Cir. does not exercise review over claims of discrimination, and mandate that cases involving discrimination is governed under §7702 of same title. See *Ballentine*, id., at 1245. Thus, "mix" case appeals falls within the District Court jurisdiction.

evidenced his filing of a "mix case appeal", but the Court did not explain how the Board or the agency complied with the regulatory and judicial requirements. See *appendix p. 14, 2nd* ¶.

In a similar case the regulation at issue was interpreted with a result different to the result in the case at bar. In *Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998), the Court interpreted that, after the Board dismissed a case, it will advised the appellant to pursue any discrimination claim by filing with the agency's EEO division. Furthermore, it indicated in summary, that without an order to the Respondent and the Board to properly notify of his right to re-file with the Agency's EEO, would be unfair, a result *"... antithetical and contrary to the statutory and regulatory scheme."* (see *Sloan*, id. at 1262). Inexplicable, in our case, the lower Court adopted the decision in *Sloan*, id., but it dismissed the indicated five actions. We object because it appears a *"... result contrary to the statutory and regulatory scheme." Sloan v. West*, 140 F.3d 1255, 1262 (9th Cir. 1998).

We pose the cases cited by our Honorable District Court were misapplied or are distinguishable.

-The Court relied primarily in *Sloan*, id. (*appendix p. 10 to 13*). Pertinent to this argument, in that case the employee filed with the Board a "mix claim" claiming civil service procedural violations and that the personnel action was taken, in part, because racial animus (discrimination). The case was dismissed on lack of jurisdiction because the Board found that there was no violations to the civil service procedures and there was no dispute about the jurisdictional facts. Instead of filing appeal with the Federal Circuit, the employee filed with the District Court seeking the case be remanded to the Board for a hearing on the merits. The District Court dismissed indicating the case was not a mixed case subject to review by that Court under 5 U.S.C. 7703(b)(2). On appeal to the 9th Cir., the Court decided that the statute of limitation to file the discrimination complaint with the agency EEO is considered to be tolled when the employee filed with the Board. Finally, the Court decided that in that case those EEO issues were tolled until the final jurisdictional determination by the Fed. Cir. where the case was transferred to; i.e.,

the EEO claim was kept "alive" and available to re-file after the Fed. Cir. decision[5]. The issue is clearly explained in footnote #1 of the concurring decision (at 1263) indicating that, if the Cir. decision is not favorable to Sloan, he *"... is free to pursue the discrimination claims in district court."*

In the case at bar, the Fed. Cir. already sustained the Board decision that it did not have jurisdiction in the relevant Board cases; therefore, the District should have ordered the Respondent and the Board to give the Appellant the notification to pursue the EEO issues at the Agency level. But it did not, thus, it appears to be a result contrary to the statutory and regulatory scheme.

-*Ballentine v. Board*, 738 F. 2d 1244 (Fed. Cir. 1984) is also distinguishable because the Federal Cir. determined the appeal to the Board was not ripe and dismissed without prejudice to re-file; in our case, ripeness was not at issue. See *appendix pp. 11, 12, 16 to 18.*

-*Ojiti v. Heyman*, 47 F. Supp.2d 6 (D.C. Dist. 1998) is distinguishable as well. The Court concluded that Mr. Ojiti was intentionally misleading the courts. Our case involves no misleading whatsoever since Appellant always intended his case to be a mix case, and informed both bodies of his intentions to obtain review of his allegations of discrimination and non discrimination. See *appendix p. 16.*

-*Parola v. I.R.S.*, 98-CV-7179(JG), 1999 Dist Lexis 19367 (ED NY December 15, 1999). Mister Parola was accused of family type offenses and even resisted arrest in his workplace, he never exhausted administrative remedies and did not raised EEO issues at Board level. The issues reviewed are far different, thus, *Parola* is disconnected, not inapplicable. See *appendix p. 15, 18.*

Also, the agency rested their petition for dismissal on subject

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[5] It is noted the decision to toll the filing of the EEO issues in fact *cured* the problem raised in our case since the path chosen by the 9th Cir. resulted in giving the employee the opportunity intended by the regulation: 29 C.F.R. 1614.302(b).

matter jurisdiction in cases disconnected from this case. For example, the conditions reviewed at *Boaeteng v. I.A.U. of Puerto Rico*, No. 99-1295, 1999 US Dist. Lexis 18983 (D.P.R. November 12, 1999), are disconnected from our case; see Memorandum in Support of the Agency's motion to dismiss at District Court case 99-1366 docket #61 at 11. Mr. Boaeteng claims were barred on grounds of "Res Judicata". This is not applicable because the causes of action at bar were not judicially reviewed; and, administratively, on five of the six personnel actions, the Board did not review the merits of our claims.

Thus, it is reasonable to conclude that the Board and agency failure to comply with the notification requirement should not result in the dismissal of these claims; please revoke.

I-b. The Court erred by dismissing the Puerto Rico claims because the "Pendent Jurisdiction" Doctrine permits these claims be reviewed, or tolled or dismissed without prejudice to re-file.

Legal Standard. "... Pendent jurisdiction permits a federal court to adjudicate state claims that are presented together with a federal claim, provided that the claim arise out of a common nucleus of operative fact and are sufficiently related that a Petitioner would ordinarily be expected to try them all in one judicial proceeding." citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Discussion. Finally, the Court dismissed the claims of discrimination based on political ideas and the claims under the heading of "Puerto Rico Claims" (*appendix pp. 18, and 25*). The latter mostly referred to violations to the Federal Torts Claim Act, 28 U.S.C. 2671, ss. Petitioner allege that these claims should be reviewed together because they arise out of a common nucleus of activities and share highly interrelated facts.

In the case at bar, the chronology of events prove that all

personnel actions were interrelated[6], and arises out of a common nucleus of operative fact. Under these conditions, a Petitioner would ordinarily be expected to try all the claims in one judicial proceeding. Thus, the claim of discrimination based on political reasons, and the tort action, should also be reinstalled and review together, or tolled, or, if dismissed, should be without prejudice to re-file.

Then, this doctrine support that the District should have exercised jurisdiction over all claims and causes of action; or tolled the Puerto Rico claims or dismiss without prejudice to re-file.

II. The Court erred finding no Prima Facie case of discrimination because did not adjust the methodology to the different factual situation of this case, and because misinterpreted relevant and material facts.

Legal Standards Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); see also *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991).

Discussion The Court determined that Petitioner failed to allege the elements of a prima facie case of national origin discrimination after determined that he failed to allege that he was performing his job at a level that met the employer's legitimate expectations or that the employer sought someone of roughly equivalent qualifications to perform substantially the same work after his departure. (*appendix pp. 19, 20*).

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[6] Soon after Petitioner complaint, the agency lowered his 1994 evaluation, did not select him for promotion, suspended him for five days, lowered his 1996 and then the 1997 performance *(appendix pp. 36, 37)* and finally dismissed him under the pretext of insubordination and disrespectful conduct.

Petitioner alleged the following material and relevant facts: (1) Petitioner is from Puerto Rico, from a minority-protected group, (2) his performance was at the level, or higher, for his auditor position, (3) Petitioner's performance ratings were lowered, he was not selected for promotion to auditor GS-511-13, and finally, was dismissed from his job, (see *appendix 36, 37*), (4) Respondent promoted various auditors from offices outside of Puerto Rico to GS-511-13, and only after Petitioner's complaint of discrimination and reports of irregularities, the employer created a new GS-511-13 position in Puerto Rico, (5) Petitioner applied for the newly created auditor GS-511-13 position, but the employer promoted an employee with similar qualifications who did not file those complaints or reports of irregularities (*appendix pp. 33, 44 at Attachments A, B*). (6) Petitioner engaged in a protected activity by rejecting the discriminatory practices as well as denouncing irregularities in the auditing practices and enforcement of the regulations. Also, he filed a discrimination complaint (*appendix 44 at Attachments A, B, C*); (7) the adverse personnel actions were taken by the employer almost immediately after petitioner' complaint and the reports of irregularities (*appendix p. 33*).

The Court must accept as true "all well-pleaded factual averments and indulg[e] all reasonable inferences in the Petitioner's favor." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (citations omitted). Then, the *McDonell-Douglas*[7] Court indicated:

> "The facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect to different factual situations." *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), *footnote 13*.

The McDonnell Douglas methodology was "...never intended to

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[7] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); where the Court clarified the applicable rules as to burden of proof and shifting this burden upon and after the making of a Prima Facie case of discrimination.

be rigid, mechanized, or ritualistic." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993).

Therefore, the elements of a Prima facie case must be adjusted according to specific facts and situations; examples of the adjustment by other Courts follows. In *Horchstadt v. Worcester Foundation For Experimental Biology*, 425 F. Sup. 318 (D. Mass. 1976), the prima facie case, in essence, was set based on these facts: (a) the employee engaged in a protected activity, (b) the employer took adverse action, and (c) there is a link between the protected activity and the adverse action. Later, in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the Court accepted, in essence, the following facts for the prima facie case: (a) the employee belonged to a protected group, (b) qualified and applied for a promotion, (c) his application was denied, and, (d) other employee with similar qualifications, but not on the protected group was promoted instead. Later, in *McKenna v. Weimburger*, 729 F.2d 783 (D.C. Cir. 1984), the Court applied substantially the same rule that in *Horchstadt*, id.

The Court agrees Petitioner belongs to a protected class, and it is evident he was removed from his job, however, the other two findings are contrary to what it is established in the record; the Court misinterpreted the allegations and rigidly, mechanically applied the standard. The Court determined that the Petitioner failed to allege the 2nd and 4th elements per the *McDonnell* doctrine. However, Petitioner did allege discriminatory practices in the training and promotion of employees assigned to the office of Puerto Rico in relation to employees in the offices of Boston, New York, Philadelphia, and Washington, D.C. (see *appendix pp. 33, 34, 36, 37, 41 to 44*).

Also, he alleged irregularities in the auditing practices[8] of certain educational institutions in Puerto Rico, including, among other, the consideration of the *political preference* of the institution's owner or

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[8] Petitioner claims intentional lack of compliance with *General Accounting Office' "Yellow Book"* requirements which at the same time it is a violation to the Inspector's General Act of 1978, 92 Stat. 1101, 5 U..S.C. Appendix 3.

directors as a base for the audit selection and as a factor for the remedial action, if any, as a consequence of the audit or investigation. Further, he alleged being the subject of reprisal by lowering his performance ratings, by not selecting him for promotion, suspending him from work, and finally dismissing him. Also, he alleged all these personnel actions were the result of his filing of the complaint, and as reprisal from reporting of irregularities to the Office of the Special Counsel and to higher administrative personnel in the agency (*appendix A-1*). Further, he alleged his dismissal was the ultimate reprisal action, taken despite the fact that he was adequately performing his job at the legitimate standards (*appendix p. 44, d-14, Attachment D*).

Therefore, the elements to establish a Prima Facie case are present in this case. The different tests were met as follows:

The *McDonnell-Douglas* test: (1) Petitioner is from Puerto Rico, from a minority-protected group, (2) his performance was at the level, or higher, for his auditor position, but (3) Petitioner's performance ratings were lowered, he was not selected for promotion, and finally, was dismissed from his job, (4) Respondent promoted various auditors from offices outside of Puerto Rico to GS-511-13, and only after Petitioner's complaint of discrimination and reports of irregularities, created a new GS-511-13 position in Puerto Rico and promoted another employee within this office, who did not file those complaints or reports (*appendix pp. 33, 34, 44 at Attachments A, B*). Also, please see footnote 1 of the dissenting opinion in *Hicks*, 509 U.S. 502, 527 (1993).

The *Horchstadt* and *McKeena* test: (a) Petitioner engaged in a protected activity by rejecting the discriminatory practices as well as denouncing irregularities, among others, in the selection of auditees and in the enforcement of the laws, rules and regulations; also, he filed a discrimination complaint (*appendix p. 44 at Attachments A, B, C*); (b) the employer took adverse action by lowering Petitioner's performance ratings, he was not selected for promotion to which he was entitled, and finally, was dismissed from his job, (c) the adverse actions started almost immediately after the complaint and the reports of irregularities (*appendix pp. 33, 34*).

The *Bundy* test: (a) Petitioner belonged to the protected group,

(b) qualified and applied for the promotion, (c) his application was denied, (d) other employee, with similar qualifications, but who did not file a discrimination complaint, nor reported irregularities was promoted instead (*appendix 44 at Attachments A, B*). Also, see *Hicks*, id., at 527.

Then, after reviewing all the allegations, and applying the applicable tests, we can conclude that all the elements of the prima facie case are present, thus, the Courts below should be revoked.

III-a. The Court erred granting summary judgement for Respondent because it made credibility findings in favor to the non-moving party without a hearing and with facts in controversy. This determination in favor of Respondent is clearly contrary to the Summary Judgement doctrine. Further, those credibility issues were resolved in conflict with the information on file.

Legal Standard. Summary judgment is appropriate where, after drawing all reasonable inferences in favor of the non-moving party, there is no genuine issue of material fact for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

Discussion. The Court provided an alternative decision if a prima facie case was found to exist (*appendix A-20*). Following with the second and third parts of the McDonnell-Douglas analysis, it determined that Respondent articulated a legitimate nondiscriminatory reason for their action by providing evidence that Petitioner was insubordinate; hence, the action was justified. Finally, the Court determined, and without a hearing on the merits, that Petitioner did not provide evidence to suggest Respondent's proffered reasons were a pretext (*appendix pp. 21-24*). We objected to these determinations as we explain below.

The reasons given by Respondent were improperly relied upon by the Court because the supporting facts were controverted,

disputed by Petitioner. Thus, relying on those facts was clear error in the application of the summary judgement standard. From the Court list of Uncontested facts, and which were relied upon by the Court, the following are also in controversy: (*Appendix pp. 6 to 9*).

(H) By memorandum dated June 9, 1994, Petitioner's supervisor, Rios, admonished Petitioner for failure to follow Rios' instructions (*appendix p. 6*).

Documents submitted to the employer by Petitioner indicates that this memo came just after he had requested review notes and instructions in writing as a protective measure against the irregularities noted and to avoid retaliation as result of his reports. Petitioner provided evidence that the senior auditor verbally attacked him after he validly requested the written instructions. Additionally, the timing of the admonishment and negative evaluation, right after Petitioner EEO complaint and reports, proves that the claims of insubordination were in fact a pretext (*appendix pp. 36, 37, 41 to 43*).

Also, this memo was not signed or authorized by any supervisor (*District Court case 99-1366 at docket 61, Ex 6*).

(I, J) Rios again issued memoranda to Petitioner on September 16, 1994 and January 20, 1995, admonishing Petitioner after he allegedly refused to prepare audit programs as directed by his supervisor (*appendix p. 6*).

Again, documents submitted by the Petitioner are indicative that these actions have been controverted as not legitimate; however, were never reviewed on the merits (*District Court case 99-1366 at docket 60*). The issue relates to Petitioner opposition to audit practices he perceived irregular because they appear to be with the purpose to benefit certain auditees or to apply the rules and regulations harsher against other auditees. The reason for this differences in the application of the rules and regulations, among other, appears to be the political preferences of the school owners. Again, Petitioner raised that the reasons for such admonishment was because he had requested instructions in writing as a protective measure to document the irregular or conflicting orders and directives. Note that a hearing was never held to hear these issues.

(K) Then, on February 10, 1995, Tournour, the Regional

Inspector General for Audit of the Defendant Agency, issued Plaintiff an official reprimand for insubordination (see *appendix p. 6*).

Petitioner objected to the use of this information to support the Respondent's allegation of insubordination when this is inadmissible in evidence. The fact is that the document was time bar per regulation (*appendix p. 39, lines 4 to 20, p. 40, lines 2 to 9*). Therefore, the lower Court improperly relied on this document as support for granting summary judgemnt for Respondent. As the Court noted (*appendix p. 20, 2nd ¶*) "... *The defendant must clearly set forth, through the admission of admissible evidence, reasons for its actions ...*"; citing *Hicks*, 509 U.S. at 507. Thus, since the information is not admissible for the stated purpose, this is not support for the decision.

(O) On January 22, 1996, Rios issued a memoranda to Petitioner admonishing him for Petitioner's alleged disrespectful attitude towards his supervisor, Celia Ruiz (*appendix p. 7*).

Again, is not admissible evidence, even if this could be considered as a fact, which it is not. Note that this was a suggestion which was never made official. The indicated memo was not even signed, was never issued or approved by a supervisor, and none of the rebuttal arguments originally presented are being considered (*District Court case 99-1366 at docket 61, Ex 9*). Again, the allegation per-se is at issue, but no hearing was held, and Petitioner arguments were never rebutted. Then, it is an error for the Court to grant summary judgement in the basis of unofficial information and which was controverted.

(Q) And on October 10, 1996, Petitioner was notified of a decision to suspend him for five days, effective October 26, 1996. (*appendix p. 7*).

Please note that this suspension is in dispute per-se (*appendix 44 at Attachment D)*; i.e., Petitioner's alleged that Respondent took reprisal against him, among others, in the form of this suspension as a result of his EEO complaint and his reports of irregular activities (*District Court case 99-1366 at docket 1*). Further, Petitioner alleges that during the incident he was intentionally provoked and that the

incident was part of Respondent's plan to "feed" his personnel file with incidents to justify the dismissal which later took place (*appendix 44 at Attachments B, C*). As to prior administrative review, please note that the incident was never reviewed on the merits by the Board; thus, the agency action is still at issue, hence, should not be grounds for the summary judgement.

Therefore, the facts relied upon by the Court are at issue per se, thus, summary judgement for Respondent was an error.

As to the 3rd step of the McDonnell-Douglas test, the Court determined that Petitioner has coming forward with no evidence to suggest Respondent's Proffered reasons for his dismissal was pretextual or to show that his employer intentionally discriminated against him (*appendix p. 22, 2nd ¶*). But this determination is in conflict with the evidence on file.

Appellant's motion for Summary Judgement included four parts: (i) the Memorandum, (ii) a SWORN STATEMENT, (iii) an ANNEX to the Request for Summary Judgement, (iv) a set of ATTACHMENTS in support (*appendix p. 45, entry 60*). Further, he filed *"Opposition to Defendant's Motion For Dismissal And for Summary Judgement"*, which included Attached documents and a Sworn Statement about Respondent's late filing (*appendix p. 45, entry 63*). Inexplicably, the Court did not discuss-explain how this information was not sufficient to infer that the action was not driven, at least in part[9], by discriminatory animus. We posed that the Court did not follow the 1st Circuit in *Williams v. Rytheon Co.*, 220 F.3d 16 (1st Cir. 2000), where the Court assessed the circumstantial evidence before making a determination.

The Court stated that *"... it is uncontested that Petitioner was issued memoranda of insubordination ..."* (*appendix p. 23, 2nd ¶*). However, such determination is based on flaw evidence. Further, Petitioner's Sworn Statement (*appendix p. 45, entry 63*), directly and

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[9] See "Contributing Factor" at 5 C.F.R. 1209.4. Same doctrine is applicable to Title VII cases.

indirectly, included information and descriptions questioning the legitimacy of those memos. It is clear that Petitioner did present evidence (came forward with) to suggest Respondent's proffered reasons for the personnel actions at issue were pretextual, and this information is also indicative that the employer intentionally discriminated against the Petitioner. Therefore, the Court should have held a hearing to listen to testimonies and evaluate the evidence presented.

The Court also considered that the other employees at the office in Puerto Rico are Puerto Ricans, then, inferred that since Respondent hired other Puerto Ricans the evidence suggested that there is no discriminatory purpose (*appendix pp. 23, 24*). But the issue raised by Petitioner relates to discriminatory practices in promotions. One of the allegation refers to discrimination in training as one of the techniques to justify the discrimination in promotions, this precisely against the personnel in the office of Puerto Rico (*District Court case 99-1366 at docket #1, appendix pp. 41 to 43*). Further, the Court did not discuss the allegation of reprisal once Petitioner opposed the discriminatory practices (*appendix pp. 36, 37*). Reprisal action for opposing to discriminatory practices is, per-se, a discrimination activity prohibited by law (42 U.S.C. 2000e-16(d)) and by regulations (29 C.F.R. 1614.101(b), and 1614.103).

III-b. The Court erred transferring the Whistleblowing allegations to the Federal Circuit because should have been tolled until the completion of the administrative process reviewing the discrimination claims.

Discussion Since the EEO-issues should be remanded to the administrative process as discussed earlier, the transferring of the whistleblowing claims to the Federal Circuit may result in the bifurcations of the claims.

Judicial interpretation requires these mix claims be reviewed together; see *Williams v. D.O.A.*, 715 F2d. 1485 (Fed. Cir. 1983). Since in this case the EEO-issues may be reviewed by the District Court after the completion of the administrative review, then, it

would be proper to toll the whistleblowing claims until that process is completed[10].

i) Conclusion.

Plaintiff uncovered and reported irregularities in the Office of the Inspector General located in San Juan, Puerto Rico, including techniques to discriminate against the employees working there. As a result of these reports, the agency had to increase its budget for the office of Puerto Rico to cover up the irregularities reported. For example, the Respondent opened a higher auditor position, improved the training for auditors and investigators, acquired new and modern computers, printers, copier, and the library resources were improved, assigned auditors from other office to jobs in arrears and to achieve compliance with laws and professional standards.

However, Plaintiff, who was the moving force in obtaining these positive changes, suffered adverse personnel action and other reprisal measures which the agency was unable to justify. Plaintiff is seeking redress because suffered damages as result of the prohibited personnel actions indicated.

Relief Sought. Wherefore, for the foregoing reasons, we respectfully request that the Court below be reversed.

Respectfully submitted,

Rafael Náter, pro-se petitioner. Date: 27/February/2002

[10] Federal Circuit granted our petition for "stay" in case 00-1589.

No. _____

In The
Supreme Court of the United States

Rafael Náter,

Petitioner

v.

Richard Riley, Secretary of the Department of Education,

Respondent

PROOF OF SERVICE

I, Rafael Náter, pro-se petitioner, declare that on this date, February 27, 2002, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or their legal representative, as applicable, by depositing an envelope containing three copies of the above stated document in the United States mail (U.S. Postal Service) properly addressed and with first-class postage prepaid.

This document was served this date on: The Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

Also, I have notified the legal representative in the lower courts. (See page (ii) at n. 1 of the Petition).

I declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge and believe.

Date: 27/February/2002

Rafael Náter
Pro-se Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL NATER (pro-se)	*	
Plaintiff	*	
vs.	*	CIVIL NO. 99-1366 (JP)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION,	*	Received and Filed 2000 Sep 14 PM 2:37
Defendant	*	Clerk's Office Annex U.S. District Court Old San Juan, P.R.

OPINION AND ORDER

I. INTRODUCTION

The Court has before it Plaintiff Rafael Náter's motion for Summary Judgment **(docket No. 60)**; Defendant Richard Riley, Secretary of the U.S. Department of Education's Motion to Dismiss Complaint and for Summary Judgment **(docket No. 61)**; Plaintiff Rafael Náter's Opposition to Defendant's motion (docket No. 63); Defendant's Reply (docket No. 67) ; and Plaintiff's Sur-Reply (docket No. 68). Also before the Court is Defendant's Motion to Dismiss Plaintiff's Puerto Rico Claims **(docket No. 15)** and Plaintiff's Opposition. thereto (docket No. 20).

Plaintiff formerly worked as an Auditor with the United States Department of Education, Office of the Inspector General. In the Complaint, Plaintiff, a Puerto Rican, alleges that he suffered adverse employment actions due to whistle-blowing activities; due to discrimination based on national origin, race, political ideas, and refusal to cease requesting orders, directives and comments in writing; and in retaliation for filing an administrative

discrimination complaint. The employment actions upon which Plaintiff bases his claims are three performance evaluations (1994, 1996 and 1997), his non-selection for a promotion in June 1995, a five-day suspension effective October 28, 1996, and his removal from the federal service on February 27, 1998. Defendant moves for dismissal of the Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and further seeks summary judgment pursuant to Federal Rule of Civil Procedure 56(c).

II. LEGAL STANDARD

The Court sets forth the relevant legal standard for each ground for dismissal raised by Defendant. First, Defendant moves to dismiss Plaintiff's discrimination claims concerning his 1994, 1996, and 1997 performance evaluations, five-day suspension, and removal from federal service for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). In assessing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court "reads the allegations of the complaint liberally, treating all well-pleaded facts as true and taking all inferences in favor of the Plaintiff." Negrón-Gaztambide v. Hernández-Torres, 35 F. 3d 25, 27 (1st Cir. 1994); see also Aversa v. United States, 99 F.3d 1200, 1209-10 (1st Cir. 1996). Further, the Court is "mindful that the party invoking the jurisdiction of a federal court carries the burden of proving its existence." Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57, 60 (1st Cir. 1993).

Second, Defendant moves to dismiss Plaintiff's claims of discrimination based on national origin, race, and political ideas pursuant to Rule 12(b)(6). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may, in response to an initial pleading, file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. It is well-settled, however, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); see also Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991). The Court must accept as true "all well-pleaded factual averments and indulg[e] all reasonable inferences in the plaintiff's favor." Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (citations omitted).

Although there is a low threshold for stating a claim, the pleading requirement is "not entirely a toothless tiger." Doyle v. Hasbro,- Inc., 103 F.3d 186, 190 (1st Cir. 1996) (quoting The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989)). Thus, a Complaint must set forth "factual allegations, either direct or inferential, regarding each material. element necessary to sustain recovery under some actionable theory." Gooley v. Mobil Oil Corp., 851 F. 2d 513, 514 (1st Cir. 1988). The Court, however, need not accept a complaint's "'bald assertion' or legal conclusions" when assessing a motion to dismiss. Abbot, III v.

United-States, 144 F.3d 1, 2 (1st Cir. 1998) (citing Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1216 (1st Cir. 1996)). The plaintiff has an affirmative responsibility "to put [his] best foot forward in an effort to present a legal theory that will support [his] claim." McCoy, 950 F.2d at 23.

Finally, Defendant moves for summary judgment on the grounds that no genuine issue of material fact exists for trial. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where, after drawing all reasonable inferences in favor of the non-moving party, there is no genuine issue of material fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if, based on the substantive law at issue, it might affect the outcome of the case. See id. at 248, 106 S. Ct. 2505; Mack v. Great Atl. & Pac. Tea Co., Inc., 871 F.2d 179, 181 (1st Cir. 1989). A material issue is "genuine" if there is sufficient evidence to permit a reasonable trier of fact to resolve the issue in the non-moving party's favor. See Anderson, 477 U.S. at 248, 106 S. Ct. 2505; Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 24 (1st Cir. 1989).

The party opposing summary judgment may not rest upon mere allegations or denials of the pleadings, but must affirmatively show, through the filing of supporting affidavits or otherwise, that there is a genuine issue for trial. See Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993). To survive a motion for summary judgment, "a plaintiff must establish at least, a genuine

issue of material fact on every element essential to his case in chief." Vega, 3 F.3d at 479 (quoting Mesnick v. General Electric Co., 950 F.2d 816, 823 (1st Cir. 1991)). In the context of Title VII, at the prima facie stage and with respect to plaintiff's ultimate burden of proving intentional discrimination, a plaintiff must adduce some minimally sufficient evidence to support a jury finding that he has met his burden." Id. Ultimately, the non-movant must provide specific facts supporting his claim that the real reason behind the employer's decision was discrimination or driven by "discriminatory animus." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S. 1018, 114 S. Ct. 1398, 128 L.Ed.2d 72 (1994); Medina-Muñoz v. R. J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990).

III. UNCONTESTED FACTS

The following facts are uncontested:

A. Plaintiff was employed as an Auditor (GS-511-12) by the U.S. Department of Education, Office of the Inspector General ("The Agency") until his removal from federal service effective February 27, 1998.

B. When Plaintiff started working in the Puerto Rico office of the Agency, there was one GS-13 position which was occupied by Porfirio Rios Rojas ("Rios").

C. On October 14, 1994, Plaintiff filed a formal complaint of discrimination with the Agency's Equal Employment Opportunity Office. By letter dated February 28, 1995, the Agency's EEO Group sent a letter to Plaintiff seeking clarification of the formal complaint. Plaintiff responded by letter dated March 18, 1995. The Group's next communication was by letter dated April 6, 1998.

D. On September 27, 1999, the EEO Group wrote to plaintiff, indicating that it was dismissing his complaint of

discrimination because it received notice that Plaintiff had filed a Complaint in this Court on April 6, 1999 containing the allegations made in the complaint before the EEO Group.[1]

E. During the time period at issue for Plaintiff's 1994 performance evaluation, Rios was assigned first line supervisory responsibilities for all audits performed by the staff of the Puerto Rico office, and Thomas Whiting ("Whiting") was assigned second line supervisory responsibilities for the Puerto Rico office. Whiting was physically located in the New York office.

F. Eugene Tournour ("Tournour"), Regional Inspector - General for Audit, was the rating official for Plaintiff's 1994 performance evaluation.

G. Rios did not provide a rating for Plaintiff's performance during the 1994 performance evaluation. Plaintiff met or exceeded each of the performance objectives included in the 1994 performance evaluation and was rated as "fully successful."

H. On June 9, 1994, Rios issued a memorandum to plaintiff concerning his refusal to follow supervisory instructions.

I. On September 16, 1994, Rios issued a memorandum to Thomas Whiting, Acting Assistant Regional Inspector General, concerning an act of insubordination by Plaintiff based upon his refusal to prepare an audit program.

J. On January 20, 1995, Rios issued a memorandum to Plaintiff concerning insubordination based upon Plaintiffs refusal to prepare a survey and audit program.

K. On February 10, 1995, Tournour issued Plaintiff a letter of reprimand for insubordination.

L. In June 1995, a second GS-13 position was created at the Puerto Rico office of the Agency.

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[1] The letter further states that the EEO Group was unable to investigate the complaint because it had "sought clarification of [Plaintiff's] complaint on several occasions but was unable to secure the necessary information needed to proceed with the complaint." (Plf's Exh. 8.)

M. Plaintiff applied for a GS-511-13 Auditor position in June 1995. He was not selected for the position; Tournour selected Celia Ruiz for the position.

N. Anyone who had worked at a GS-12 position for a year could have applied to any GS-13 position in any Agency office.

O. On January 22, 1996, Rios issued a memorandum to Plaintiff admonishing him for allegedly having displayed a disrespectful attitude towards Plaintiff's supervisor, Celia Ruiz.

P. On April 20, 1996, Plaintiff filed an appeal with the MSPB alleging that he received a "fully successful-"' summary rating and was not selected for promotion to the GS-511-13 Auditor position in June 1995 in reprisal for whistle-blowing (NY-1221-96-0334-W-1) . A hearing was held on November 14, 1996 before the MSPB.

Q. By letter dated October 10, 1996, the Agency suspended Plaintiff for five days, effective October 26, 1996.

R. Plaintiff received a summary rating of "fail" for the 1996-97 evaluation period.

S. On November 17, 1997, Guido Piacesi proposed that Plaintiff be removed from federal service based on insubordination and inappropriate and unprofessional behavior. On Februa; 25, 1998, Hugh Monaghan issued a decision removing Plaintiff from the federal service.

T. On December 18, 1997, the MSPB issued its Initial Decision in NY-1221-96-0334-W-1, denying Plaintiff's request for corrective action. The MSPB found that Plaintiff abandoned the issue of non-selection for the GS-13 Auditor position in June 1995 at the hearing. The MSPB further found that plaintiff did not make any protected disclosures, and thus failed to establish jurisdiction.

U. The issue of discrimination based upon race, national origin and/or reprisal was not adjudicated during the hearing in NY-1221-96-0334-W-1.

V. In the December 18, 1997 Initial Decision, Plaintiff was informed that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff' was also informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

W. On November 3, 1998, the MSPB denied Plaintiff's petition for review of the December 18, 1997 Initial Decision.

X. On November 23, 1998, Plaintiff filed a petition with the Equal Employment Opportunity Commission, Office of Federal Operations, for review of the MSPB's final decision in NY1221-96-0334-W-1. The EEOC issued a denial of consideration on February 22, 1999, holding that "[b]ecause the MSPB did not address any [] matters within the Commission's jurisdiction, the Commission, has no jurisdiction to review petitioner's case."

Y. Plaintiff filed an appeal (NY-1221-98-0401-W-1) alleging that his 1997 performance evaluation was in reprisal for whistle-blowing activities. In a December 31, 1998 Initial Decision, the MSPB dismissed plaintiff's appeal for lack of jurisdiction.

Z. In its December 31, 1998 Initial Decision, the MSPB informed plaintiff that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff was also informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

AA. Plaintiff filed an appeal with the MSPB concerning his 1995-96 and 1996-97 performance appraisals; his five-day suspension; and his removal from federal service. The MSPB docketed the removal action (NY-1221-98-0272-I-1) separately from the remaining personnel actions (NY-122198-0272-W-1).

BB. In the appeal docketed NY-1221-98-0272-W-1,, Plaintiff alleged that his 1995-96 and 1996-97 performance appraisals and the five-day suspension were based on whistle-blowing activities. Plaintiff also alleged that he was discriminated against by the Agency because of his race, national origin, and political ideas.

CC. On March 2, 1999, the MSPB issued an Initial Decision in NY-1221-98-0272-W-1, dismissing the appeal for lack of jurisdiction.

DD. The MSPB informed plaintiff in its March 2, 1999 Initial Decision that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff was also

informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

EE. The MSPB did not adjudicate the issue of discrimination in the appeals docketed NY-1221-96-0334-W-1 (1994 performance evaluation & non-selection for promotion) ; NY-1221-98-0401-W-1 (1997 performance evaluation) ; or NY-1221-98-0272-W-1 (1996 and 1997 performance evaluations and five-day suspension).

FF. Plaintiff filed an MSPB appeal of his removal from the federal service. The appeal was docketed as NY-0752-98-0297-I-1.

GG. On March 18, 1999, the MSPB issued an Initial Decision in NY-0752-98-0297-I-1, finding that it possessed jurisdiction but affirming the Agency's removal action on the grounds that the Agency proved three charges of insubordination and one charge of inappropriate and unprofessional behavior, and that the Agency would have removed the appellant absent his disclosures. The MSPB also found that Plaintiff failed to present a prima facie case of national origin discrimination.

HH. In its March 18, 1999 Initial Decision, the MSPB informed Plaintiff that he could file a petition for review of the decision with the MSPB, with the Equal Employment Opportunity Commission, with the United States District Court if plaintiff was contesting the MSPB's decision on discrimination issues, or with the United States Court of Appeals for the Federal Circuit if plaintiff chose not to contest the Board's discrimination decision.

II. Plaintiff is a member of a protected group (Puerto Rican).

JJ. All of the auditors in the Puerto Rico Office of the Inspector General were members of Plaintiff's protected group (Puerto Rican).

KK. Plaintiff filed petitions for review before the U.S. Court of Appeals for the Federal Circuit of MSPB decisions concerning the following personnel actions: 1994, 1996 and 1997 performance evaluations and the five-day suspension.

LL. In a per curiam opinion dated May 9, 2000, the Federal Circuit affirmed the MSPB's decisions concerning the 1994, 1996 and 1996 performance evaluations and the, five-day suspension.

IV. DISCUSSION

A. SUBJECT MATTER JURISDICTION

In 1978, Congress passed the Civil Service Reform Act, Pub. L. No. 95-454, 1, 92 Stat. 1111 (1978) (codified as amended in various sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994)). Among other things, the Civil Service Reform Act created the Merit Systems Protection Board ("MSPB"), a independent quasi-judicial federal agency with jurisdiction to review civil service decision. See 5 U.S.C. §§ 1201-06; see also McAdams v. Reno, 64 F.3d 1137, 1141 (8th Cir. 1995). The MSPB has jurisdiction to review adverse employment actions which fall into one of five categories: removal, suspension for more than 14 days, reduction in grade, reduction in pay, or a furlough of 30 days or less. See 5 U.S.C. § 7512; see also Sloan v. West, 140 F.3d 1255, 1259 (9th Cir. 1998). It also has pendent jurisdiction over discrimination claims brought in connection with an adverse employment action by a federal agency. See 29 C.F.R. 1614.302 (2000); see also Sloan, 140 F.3d at 1259.

Federal employees asserting Title VII claims must exhaust administrative remedies as a precondition to filing a civil action in a federal district court. See Brown v. General Servs. Adm., 425 U.S. 820, 832, 96 S. Ct. 1961, 1967, 48 L.Ed.2d 402 (1976). Where a federal employee claims to have been affected by both an adverse employment action and a related Title VII violation, a so-called "mixed case," the employee may elect either to file a complaint with the relevant federal agency's Equal Employment Opportunity ("EEO")

department or to assert both claims before the MSPB in order to satisfy the exhaustion of administrative remedies requirement. See McAdams, 64 F.3d at 1141; see also 5 U.S.C. § 7702; 29 C.F.R. § 1613.403. If the employee chooses to proceed by filing a mixed case complaint before the agency's EEO, and wishes to preserve both claims, the employee must appeal the EEO decision to the MSPB[2], not to the EEOC; otherwise, the employee will be deemed to have waived the non-discrimination claim. See Sloan, 140 F.3d at 1260. Alternatively, the employee may proceed directly to the MSPB without first resorting to the agency's EEO department. See McAdams, 64 F.3d at 1141.

When a case is appealed to the MSPB, the MSPB makes threshold determination of jurisdiction. A finding by the MSPB that it lacks jurisdiction to hear a claim is appealable only to the United States Court of Appeals for the Federal Circuit. See Sloan, 140 F.3d at 1262; Synan v. Merit Systems Protection Bd., 765 F.2d 1099, 1101-02 (Fed. Cir. 1985); Ballentine v. Merit Systems Protection Bd., 738 F.2d 1244, 1247 (Fed. Cir. 1984); see also 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295; 5 C.F.R. § 1201.120. On the other hand, if the MSPB determines that it has jurisdiction, and decides the merits of both the nondiscrimination claim and the discrimination claim, the case

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[2] If 120 days have passed without a judicially reviewable action by the EEO department of the agency, the employee may appeal the matter to the MSPB even in the absence of an agency decision. See McAdams, 64 F.3d at 1141-42; 5 U.S.C. § 7702(e)(2).

becomes a "mixed case appeal."[3] See Sloan, 140 F.3d at 1261; see also 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.175.

A final decision by the MSPB in a mixed case appeal may then be appealed to a United States District Court. See Sloan, 140 F.3d at 1261; New v. Brown, No. 97-CV-125, 1997 WL 666173, *3 (E.D. Pa. Oct. 21, 1997). When the MSPB "does not consider the employee's claim of discrimination on its merits, review of the [MSPB's] determination that it lacks jurisdiction to hear the employee's claim lies exclusively in the Federal Circuit." Wall v. United States, 871 F. 2d 1540, 1543 (10th Cir. 1989), cert. denied, 493 U.S. 1019, 110 S. Ct. 717, 107 L.Ed.2d 737 (1990); New, 1997 WL 666173 at *3; see also 5 U.S.C. § 7703 (b). Upon appeal, the plaintiff would have to convince the Federal Circuit that it is a mixed case. If the plaintiff succeeded in that endeavor, the District Court still would not have jurisdiction over the case. Rather, the Federal Circuit would remand the case to the MSPB, and the MSPB would have to rule on the discrimination claim. See Wall, 871 F.2d at 1543; New, 1997 WL 666173 at *3. Only after the MSPB reaches a decision on the merits of plaintiff's discrimination claim would the District Court have jurisdiction. See Ballentine, 738 F.2d at 1246 ("[U]ntil the discrimination issue and the appealable action have been decided on

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[3] 29 C.F.R. § 1614.302 ("A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency auction was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.").

the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under [5 U.S.C.] § 7702 or § 7703.").

The Court finds that Plaintiff's claims concerning his non-selection for promotion in June 1995; his 1994, 1996 and 1997 performance evaluations; and his five-day suspension are subject to dismissal for lack of subject matter jurisdiction. Over Plaintiffs removal claim, however, this Court possesses jurisdiction. The Court will discuss each of these claims in turn.

1. 1994 Performance Evaluation and Non-Selection for Promotion

Plaintiff brought an appeal before the MSPB concerning a performance evaluation for the period ending in 1994 and his non-selection for promotion to a GS-13 Auditor position in June 1995. This appeal was docketed as NY-1221-96-0334-W-1. Plaintiff alleged that the lower evaluation and his non-selection for promotion were in reprisal for having made protected disclosures under the Whistle Blowing Act. It is unclear whether Plaintiff alleged in that appeal that the negative evaluation and non-selection for promotion were motivated by discrimination. In its December 18, 1997 decision, the MSPB noted in a footnote that Plaintiff expressed that he was "looking for a review of the case [Plaintiff] presented as of October 14, 1994 to the Department of Education, EEO Division, where [Plaintiff] claimed discrimination," but the decision reflects that no factual allegations of discrimination were presented for review. (Dft's Exh. 18, at 2.) The MSPB found that it did not possess

jurisdiction over the claim because Plaintiff made no protected disclosures, and dismissed the appeal. (Dft's Exh. 18.) The MSPB did not consider Plaintiff's discrimination claim, if any, nor did it make a finding that Plaintiff's case was a "mixed case appeal." The MSPB further found that Plaintiff had abandoned his claim of non-promotion because no evidence of the same was presented at the hearing. (Id., at 8.) Plaintiff then appealed to the Federal Circuit. On May 9, 2000, the Federal Circuit affirmed the decision of the MSPB. See Náter v. Department of Educ., Nos. 99-3083, 99-3143, 99-3213, 2000 WL 565471, *3 (Fed. Cir. May 9, 2000). The Federal Circuit opinion makes no mention of any claim of discrimination raised by Plaintiff, nor of the claim of non-promotion.

Plaintiff alleges in his Opposition that he was never notified that his case was not a mixed case appeal, and for this reason was prevented from preserving his discrimination claim by arguing that issue to the Federal Circuit or by filing an EEO complain. He cites 29 C.F.R. § 1614.302(b), which states that "if a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of the notice and to file an EEO complaint, subject to § 1614.107." Although Plaintiff has presented evidence to this Court that he stated to the MSPB that he intended to file a mixed case appeal, that stated intention does

not so transform his case. As discussed earlier, a case does not become a "mixed case appeal" unless and until the MSPB determines that it possesses jurisdiction. See Sloan, 140 F.3d at 1261. It is uncontested that the MSPB dismissed the action for lack of jurisdiction, and that the MSPB found Plaintiff to have abandoned the claim of non-promotion.

Moreover, the Court's review of the motions and the evidence before it makes clear that Plaintiff has consistently failed to present anything more than a passing reference to a claim of discrimination to the MSPB, devoid of factual allegations or evidence of the same. As the District Court for the Eastern District of New York recently observed, "a passing reference is simply insufficient to put the MSPB on notice of a [] discrimination claim, an the MSPB was evidently unaware of any such allegation in this case," Parola v. Internal Revenue Service, No. 98-CV-7179 (JG), 1999 WL 1215557, *3 (E.D.N.Y. Dec. 15, 1999). Plaintiff's attempt to shift the blame to the MSPB for its lack of treatment of Plaintiff's discrimination claim, and his suggestion that he was purposefully misguided to prevent him from seeking review of the decision, Plf's Opp. at 18, is unavailing and itself misguided. And of course, to extent the that Plaintiff deliberately declined to present evidence of discrimination to the MSPB in order to try the discrimination claim before this Court, it is well-settled that such tactics have been disapproved and result in the waiver of the discrimination claim.

See Ojiti v. Heyman, 47 F. Supp.2d 6, 7-8 (D.D.C. 1998) (citing Smith v. Horner, 846 F.2d 1521, 1524 (D.C. Cir. 1988)).

In conclusion, because the MSPB never found Plaintiff's case to be a "mixed case appeal," this Court lacks jurisdiction to adjudicate Plaintiff's claim arising from the 1994 performance evaluation. See Ballentine, 738 F.2d at 1246. In addition, Plaintiff was found to have abandoned his non-promotion claim, and failed to raise this issue on appeal before the Federal Circuit. As such, these claims are hereby **DISMISSED.**

2. 1996, 1997 Performance Evaluations and Five-Day Suspension

Plaintiff brought an appeal before the MSPB concerning his 1996 and 1997 performance evaluations and for a five-day suspension effective October 28, 1996, alleging that these adverse agency actions were taken against him in reprisal for having made protected disclosures under the Whistle Blowing Act and that he had been discriminated against on account of race, national origin, or political ideas. These claims were docketed as case numbers NY-1221-98-0272-W-1 and NY-1221-98-0401-W-1. In a decision dated, March 2, 1999, the MSPB found that it did not possess jurisdiction over the claims because Plaintiff made no protected disclosures and that Plaintiff did not plead facts which, if true, would establish jurisdiction. (Dft's Exh. 22.) The MSPB did not consider Plaintiff's discrimination claim on the merits nor make a finding that Plaintiff's case was a "mixed case appeal." Plaintiff appealed,

and the Federal Circuit affirmed the decision of the MSPB. See Náter, Nos. 99-3083, 99-3143, 99-3213, 2000 WL 565471 at *4. The Federal Circuit makes reference to Plaintiff's EEO complaint only to the extent that Plaintiff argued before that Court that Plaintiff was retaliated against for filing an EEO complaint. See id. However, the Federal Circuit discussed that claim in the context of "protected disclosures" under the Whistle-Blowing Act, finding that the filing of an EEO complaint does not constitute a protected disclosure. Thus, in view of the uncontested fact that the MSPB never found Plaintiff's case to be a "mixed case appeal," this Court lacks jurisdiction to adjudicate these claims. See Ballentine, 738 F.2d at 1246. Therefore, the Court hereby **DISMISSES** the claims related to the 1996 and 1997 performance evaluations and the five-day suspension.

3. Removal

Plaintiff brought an appeal before the MSPB with respect to his removal from the position of Auditor, GS-12, effective February 27, 1998. Plaintiff alleged that he was removed in reprisal for having made protected disclosures under the Whistle Blowing Act and on account of national origin discrimination. This case was docketed as case number NY-0752-98-0297-I-1.

In a decision dated March 18, 1999, the MSPB found that it possessed jurisdiction over the removal claim because Plaintiff made protected disclosures. (Dft's Exh. 23.) However, the MSPB concluded that Plaintiff failed to prove that his whistle-blowing activities

were a contributing factor in his removal, and further determined that the agency proved by clear and convincing evidence that it would have removed Plaintiff absent the protected disclosures. (id.) With respect to the claim of national origin discrimination, the MSPB found that Plaintiff produced no evidence to support this claim, and thus failed to establish a prima facie case of discrimination. (id.) Because the MSPB reached the claim of national origin discrimination in relation to Plaintiff's removal, Plaintiff may properly appeal the decision to this Court. See Ballentine, 738 F.2d at 1246; see also 5 U.S.C. § 7703(b)(2).

In his Complaint, however, Plaintiff also raises claims of discriminatory removal on the basis of race and political ideas. (Compl. ¶ 17). Because the MSPB only considered the merits of Plaintiff's claim for national origin discrimination in his removal, this Court possesses jurisdiction over that claim alone. Because the MSPB did not consider the claims of discriminatory removal based on race and political ideas on the merits, these claims are hereby **DISMISSED.**[4] The Court will now proceed to assess Plaintiff's claim

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[4] In the Complaint, Plaintiff alleges that he was discriminated against based in part on his political ideas and his refusal to cease requesting orders, directives and comments in writing. Discrimination on the basis of political ideas and/or a refusal to cease requesting orders, directives and comments in writing are not cognizable under Title VII. See Hernández-Ortiz v. Díaz Colón, 134 F.3d 361 (1st Cir. 1998) (per curiam); Parola, No. 98-CV-7179 (JG), 1999 WL 1215557, at *3. Further, Plaintiff has failed to allege any other cognizable cause of action in connection with these allegations. As such, the claim of discrimination based on political ideas is hereby **DISMISSED** on this alternative ground, and the Court further **DISMISSES** the claim of discrimination based on refusal to cease requesting orders, directives and comments in writing.

of national origin discrimination in his removal from the. federal service.

B. NATIONAL ORIGIN DISCRIMINATION IN REMOVAL

Because Plaintiff produces no direct evidence of national)rial origin discrimination in his removal, the Court applies the McDonnell Douglas burden-shifting framework. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429 (1st Cir. 2000). In McDonnell Douglas, the United States Supreme Court established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases. The goal of this burden-shifting framework is to "progressively . . . sharpen the inquiry into the elusive factual questions of Intentional discrimination". St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 8, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981)).

The plaintiff "carr[ies] the initial burden under the statute of establishing a prima facie case of [national origin] discrimination." McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. 1817. This initial burden is not onerous. See Burdine, 450 U.S. at 253-54, 101 S. Ct. at 1094. In an employment termination case, the plaintiff establishes a prima facie case by showing that: (1) the plaintiff is within a protected class; (2) he was performing his jot) at a level

that met the employer's legitimate expectations; (3) he was nevertheless dismissed; and (4) the employer sought someone of roughly equivalent qualifications to perform substantially the same work after his departure. See Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Ci.. 1996) ; Lipsett v. University of Puerto Rico, 864 F.2d 881, 899 (1st Cir. 1988) . It is uncontested that Plaintiff is Puerto Rican, and thus within a protected class, and that he was removed from his position as Auditor with the Defendant Agency. A careful review of the Complaint reveals, however, that Plaintiff fails to allege that he was performing his job at a level that met the employer's legitimate expectations, or that Plaintiff's employer sought someone of roughly equivalent qualifications perform substantially the same work after his departure. Because Plaintiff failed to allege the elements of a prima facie case, the Court hereby **DISMISSES** Plaintiff's claim of discriminatory removal on the basis of national origin discrimination.

In the alternative, the Court finds that even if Plaintiff had properly plead the elements of a prima facie case of national origin discrimination in his removal, Defendant would be entitled to summary judgment. Once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for discharging the plaintiff. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. 1817; Lipsett, 864 F.2d at 899. "[The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which,

if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Hicks, 509 U.S. at 507, 113 S. Ct. 2742. Once the defendant has met its burden of production in this regard, the plaintiff is then given the opportunity "to demonstrate that the proffered reason was not the true reason for the employment decision, but was instead prerextual." Lipsett, 864 F.2d at 899 (internal quotations omitted) . Plaintiff's burden of proving pretext merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. See Burdine, 450 U.S. at 256, 101 S. Ct. at 1095 (citing McDonnell Douglas, 411 U.S. at 804-05) . The plaintiff thus may satisfy its burden either by proving pretext or by proving that the employer was more likely motivated by discriminatory intent. See id.

In the summary judgment context, a plaintiff must show-evidence sufficient for a fact finder to reasonably conclude that the employer's decision to terminate was driven by a discriminatory animus. See LeBlanc, 6 F.3d at 843. If the record is "'devoid of adequate direct or circumstantial evidence of the employer's discriminatory intent," the entry of summary judgment for the employer is appropriate. See Mulero-Rodríguez, 98 F.3d at 673 (citing Pages-Cahue v. Iberia Líneas Aéreas de España, 82 F.3d 533, 537 (1st Cir. 1996)).

Defendant has come forward with evidence to show that Plaintiff was dismissed for insubordination in satisfaction of its burden of

production. By memorandum dated June 9, 1994, Plaintiff's supervisor, Rios, admonished Plaintiff for failure to follow Rios' instructions. (Dft's Exh. 6.) Rios again issued memoranda to Plaintiff on September 16, 1994 and January 20, 1995, admonishing Plaintiff after he allegedly refused to prepare audit programs as directed by his supervisor. (Dft's Exhs. 7, 8.) Then, on February 10, 1995, Tournour, the Regional Inspector General for Audit of the Defendant Agency, issued Plaintiff an official reprimand for insubordination. (Dft's Exh. 10.) On January 22, 1996, Rios issued a memoranda to Plaintiff admonishing him for Plaintiff's alleged disrespectful attitude towards his supervisor, Celia Ruiz. (Dft's Exh. 9.) And on October 10, 1996, Plaintiff was notified of a decision to suspend him for five days, effective October 28, 1996, for disrespectful conduct during a meeting with Bernard Tadley and Celia Ruiz on April 19, 1996, during which Plaintiff was alleged to have leapt from his chair, thrown a note-pad and pen against the wall, yelled "damn it" in Spanish, and rushed back to his work area. (Dft's Exh. 11.)

Plaintiff has come forward with no evidence to suggest Defendant's proffered reason for Plaintiffs dismissal was pretextual or to show that his employer intentionally discriminated against him. In a recently decided case, the First Circuit addressed precisely such a scenario, affirming the district court's entry of summary judgment against a plaintiff suing under Title VII. See Williams v. Raytheon Co., 220 F.3d 16 (1st Cir. 2000). In Williams, the

plaintiff alleged that he had been terminated from his employment on account of gender discrimination. The employer proffered a legitimate non-discriminatory justification for the plaintiff's termination; namely, that plaintiff had been terminated for insubordination. Notwithstanding plaintiff's contention that such justification was a pretext for discrimination, the district court entered summary judgment against plaintiff. See id. at --. The First Circuit affirmed, observing that the plaintiff "made no showing, much less a substantial showing, that the insubordination justification was false." Id. at --. The First Circuit went on to assess the circumstantial evidence before it to determine whether it would permit a reasonable juror to find that plaintiff sustained its burden of proving intentional discrimination. In so doing, it found that the decision-maker had hired individuals of the plaintiff's gender, and that, other than a few stray remarks, the evidence did not support a reasonable inference of intentional discrimination. See id. at --.

Similarly, in the case at bar Plaintiff submitted no evidence of pretext. It is uncontested that Plaintiff was issued memoranda for insubordination and disrespectful conduct on several occasions, was issued a formal reprimand on one occasion, and was placed on a five-day suspension for disrespectful conduct. Further, Plaintiff has come forward with no circumstantial evidence of intentional discrimination. It is uncontested that all of the auditors at the Puerto Rico office of the Inspector General were Puerto Rican and

therefore, as in Williams, because the same decision-makers hired Puerto Ricans as Auditors, the evidence suggests that Defendant did not act out of discriminatory purpose. See id. at –. Because Plaintiff did not make a substantial showing that the proffered justification for his removal was false, and there is no evidence upon which to support a reasonable inference of intentional discrimination, the Court hereby **DISMISSES** the claim of national origin discrimination.

C. REMOVAL BASED UPON WHISTLE-BLOWING ACTIVITIES

Because the Court has dismissed the discrimination claim for removal, it declines to exercise jurisdiction over the non-discrimination claim for removal based upon whistle-blowing activities. See Afifi v. Department of Interior, 924 F.2d 61, 64 (4th Cir. 1991) (district court has discretion to retain jurisdiction over non-discrimination claim after dismissal of discrimination claim). Section 1631 provides for the transfer of an action to "any other such court in which the action or appeal could have been brought at the time it was filed or noticed," if such is in the interests of justice. 28 U.S.C. § 1631. Thus, Plaintiff's MSPB appeal may be transferred to the Federal Circuit if the action could have properly been brought in the Federal Circuit at the time that it was filed here and if transfer would be in the interests of justice. See Franchi v. Manbeck, 947 F.2d 631, 634 (2nd Cir. 1991).

Under 5 U.S.C. § 7703(b)(1), a petition for judicial review must be filed in the Federal Circuit "within 60 days after the date the

petitioner received notice of the final order or decision of the Board." Here, the MSPB issued its decision on March 18, 1999, and Plaintiff filed this action on April 6, 1999. Thus, this action would have been timely if it had been filed in the Federal Circuit. Further, interests of judicial economy dictate that the Federal Circuit, as a specialized forum, is best suited to review Plaintiff's non-discrimination claim for removal based upon whistle-blowing activities. See Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1998) (a court can transfer a case to another forum even if not asked to do so by either party) (citing Rodriguez-Román v. Immigration & Naturalization Service, 98 F. 3d 416, 423 n. 9 (9th Cir. 1996)) . The Court further believes that such transfer is fair, as it preserves Plaintiff's right to review when it otherwise may be barred by the statute of limitations, and presents no inconvenience to either party to file pre-existing documents with the Federal Circuit rather than with this Court. Therefore, pursuant to 28 U.S.C. § 1631, this Court hereby **TRANSFERS** this claim to the Federal Circuit for review.

D. PUERTO RICO LAW CLAIMS

In the Complaint, Plaintiff states that he invokes the pendent jurisdiction of this Court under the laws of Puerto Rico.. Yet, the Complaint fails to state what Puerto Rico laws, if any, he seeks to invoke as a basis for recovery. Defendant moves dismiss to Plaintiff's state law causes of action on the grounds that the Civil Service Reform Act's ("CSRA") comprehensive scheme provides the exclusive remedy for federal employee complaints of prohibited

personnel Practices. See Roth v. United States, 952 F. 2d 611, 614-16 (1st Cir. 1991); Berrios v. Department of Army, 884 F. 2d 28, 31-32 (1st Cir. 1989). Defendant further moves for dismissal of any state law claims because, with respect to claims of discrimination in federal employment, Title VII of the Civil Rights Act of: 1964, as amended by the Civil Rights Act of 1991, provides the exclusive remedy. See Brown v. General Services Admin., 425 U.S. 820, 834-35, 96 S. Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976).

In his Opposition, Plaintiff responds that "the laws of Puerto Rico may became [sic] applicable and therefore, should be accepted as another cause of action." (Plf's Opp. at 2.) He further argues that the Complaint alleges "abusive practices, . . . tort, entrapment, and other illegal, unethical, immoral, and even bizarre activities . . . " which may be actionable under Puerto Rico law. This description leaves considerable ambiguity as to the precise nature of the claims Plaintiff intends to raise under Puerto Rico law. Notwithstanding, the Court finds that in light of the factual allegations set forth in the Complaint, Plaintiff seeks to invoke Puerto Rico law for redress of prohibited personnel practices or for discrimination. Because such causes of action are preempted by federal law, the Court hereby **DISMISSES** Plaintiff's Puerto Rico law claims. See Roth, 952 F.2d at 616 ("In general, a federal employee whose position comes with CSRA's reach may seek redress for the untoward effects of a prohibited personnel practice only through the

panoply of remedies that CSRA itself affords."); Brown, 425 U.S. at 834-35, 96 S. Ct. 1968-69.

V. CONCLUSION

In view of the foregoing, the Court hereby **DISMISSES** the Complaint, with the exception of the claim of removal in reprisal for whistle-blowing, which is hereby **TRANSFERRED** to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1631. The claim for discrimination in Plaintiff's removal from the federal service is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13 day of September, 2000.

(signed by:)

JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL NATER (pro-se) *

Plaintiff *

vs. * CIVIL NO. 99-1366 (JP)

RICHARD RILEY, SECRETARY * OF U.S. DEPARTMENT OF EDUCATION, *

Defendant *

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U.S. District Court
Old San Juan, P.R.

FINAL JUDGMENT

Pursuant to the Opinion and Order of this same date, the Court hereby enters **JUDGMENT, DISMISSING** all causes of action raised in Plaintiff's Complaint and Amended Complaint except the non discrimination claim for Plaintiff's removal from federal service, which is hereby **TRANSFERRED** to the United States Circuit Court of Appeals for the Federal Circuit. The claim for discrimination in Plaintiff's removal from the federal service is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, this 13th day of September, 2000.

(sign by)

JAIME PIEDRAS, JR.
U.S. SENIOR DISTRICT JUDGE

A 72A
(Rev.8/82)

[NOT FOR PUBLICATION-NOT TO BE CITED AS PRECEDENT]

United States Court of Appeals
For the First Circuit

No.00-2348

RAFAEL NATER,
Plaintiff, Appellant,

v.

RICHARD RILEY,
SECRETARY OF U. S. DEPT. OF EDUCATION,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., Senior U.S. District Judge]

Before

Boudin, Chief Judge,

Selya and Lynch, Circuit Judges.

Rafael Nater on brief pro se.

Guillermo Gil, United States Attorney, on brief for appellee.

July 23, 2001

Per Curiam. After carefully considering the briefs and record on appeal, we affirm for the reasons stated by the district court in its order and opinion.

Affirmed. Loc. R. 27 (c) .

United States Court of Appeals
For the First Circuit

No.00-2348

RAFAEL NATER,
Plaintiff, Appellant,

v.

RICHARD RILEY,
SECRETARY OF U. S. DEPT. OF EDUCATION,
Defendant, Appellee.

JUDGMENT

Entered: July 23, 2001

This cause came on appeal on the original record and briefs from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court

[Stamp by:]

JANICE M. O:NEIL

Acting Clerk.

[cc: Mr. Nater & Mr. Gil]

United States Court of Appeals
For the First Circuit

No.00-2348

RAFAEL NATER,
Plaintiff, Appellant,

v.

RICHARD RILEY,
SECRETARY OF U. S. DEPT. OF EDUCATION,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Selya and Lynch, Circuit Judges.

ORDER OF COURT

Entered: December 4, 2001

We deny Mr. Nater's motion for a rehearing. He raises no issues meriting reconsideration.

By the Court:

Richard Cushing Donovan, Clerk

[stamp by:] By: JULIE GREGG
Appeals Attorney

[cc: Mr. Rivera-Cordero, Mr. Nater, Mr. Sevillano Del Rio, Mr. Fernandez-Torres and Mr. White.]

FORMAL COMPLAINT OF DISCRIMINATION

October 14, 1994

Mrs. Viola Sanchez-Director
Equal Employment Opportunity Staff
US/ED FOB 10 Room 2468
600 Independence Ave., S.W. Wa. D.C. 20202-4550

Mrs. Sanchez;

This is a formal complaint submitted pursuant to Federal rules and regulations (29 CFR 1614). At this moment I want to indicate that my complaint is a "Mixed case complaint'. as defined in 29 CFR 1614.302.

"... A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the HSPB has jurisdiction to address. ")

In summary is my position that I have been discriminated against as well as I have been denied the opportunity to compete for a promotion, and to move to investigations within the OIG, based on my race - hispanic - (or because my national origin), ideas, and because retaliation has been taken against me.

Retaliation. as well as discrimination. resulted based on the fact that I have brought to supervisors' attention facts of wrongdoing, abuses, favoritism (nepotism), probable violation of law. rules and regulations, professional standards and professional ethics, abuse of authority, and because I have refused to follow orders-directives by which I would have violated the law, rules or regulations, or professional standards.

Also I have been the target of undeserved defamation, discredit and suffer threaten by the auditor in charge of my office. Further I have been asked not to compete for specific competitive positions by managers; also have been told that based on the "problems" in our office management may decide to close down this office - this constitute another way to threaten me, black mail me. If so, this will result in having me to move to U.S. or to resign my job.

These actions (conditions) have been performed in a concealed, carefully calculated manner. They are not easily detectable, the picture is not crystal clear. This is probably because the experience gained discovering hidden facts, unfortunately has been misused to cover up wrongdoings. Thus, this is why the condition noted is very sensitive. and of great concern.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

In re:
RAFAEL NATER — Docket No. NY-1221-96-0334-W-1
Appellant

v.

DEPARTMENT OF EDUCATION — Hato Rey, Puerto Rico
14 November 1996
Agency — 10:00 a.m.

NATIONAL LABOR RELATIONS BOARD
HEARING ROOM; ROOM 591
FEDERICO DEGETAU FEDERAL BLDG.
CARLOS CHARDON AVENUE
HATO REY PUERTO RICO

The above-captioned matter came on for hearing pursuant to Notice on October 24, 1996, and was heard today, 14 November 1996 at 10:00 a.m.

BEFORE: Hon. William J. Lee,
Administrative Judge

APPEARANCES:
For the Appellant: Androides Candidas Rivera, Esq.
For the Agency: Tracey Sasser, Esq.
Translator/Interpreter:
Court Reporter: Michael T. Kwolek

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CONTRAST BETWEEN *SUPERVISORY COMMENTS* ABOUT NÁTER'S PERFORMANCE
Before and *After* Discrimination and Irregularities Reported on June 1994 and thereafter.

Before June 1994	*After* June 1994
From April 1987 to May 1994 he received encouraging comments; e.g.: -Sept 1987: "... He was **a very good analytical reasoner** who reaches sound decisions." -Sept 1989: " ... needs little guidance in Planning and executing an audit ... He also works very hard to **ensure that products are produced in a timely fashion, ...**" -Sept 1990: "... **work was accurate and fully documented,** ... letters and memos ... were **prepared following OIG policies** ..." -Sept 1992: "... audits disclosed significant audit findings, ... is always **eager to explain technical auditing issues to other members of the staff** ..." -Sept 1993: "... assignments were **always conducted in accordance with OIG policies and requirements** ..." -May 1994: "... **continuos to do a good job,** above	After Náter filed various reports of audit irregularities and a discrimination complaint; the supervisors changed the comments: -April 1997: "... **incomplete analysis and questionable conclusions** ... writings are not acceptable and **does not meet the agency standard or the Government Auditing Standards** ..." -April 1996: "... **use of time was inefficient and ineffective** ... **findings** at Emory and IJC were **unsupported** ... do not encourage teamwork ..." -Sept 1994: "... made **inferences without support** ... still need to realize that all of his written products are not legal briefs."

average use of the computer as applied to the audit process ..."

It is, *BEFORE* June 1994 supervisors appears to *appreciate* Náter's performance, *effort*, *analytical capabilities*, completeness of work.

However, *AFTER* Náter filed a discrimination complaint and reported irregularities in the audit process, the supervisors retaliated against him by discrediting his professionalism, skills, capabilities, and character by **negative** performance COMMENTS and **lowering** his performance RATINGS.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

In re:
RAFAEL NATER — Docket No. NY-0752-98-0297-I-1

Appellant

v.

DEPARTMENT OF EDUCATION — Hato Rey, Puerto Rico
9 July 1998
Agency — 9:30 a.m.

VOL. I
HEARING
NATIONAL LABOR RELATIONS BOARD
LA TORRE DE PLAZA , SUITE 1002
525 FRANKLIN DELANO ROOSEVELT AVE.

The above-captioned matter came on for hearing pursuant to Notice on 13 May and was heard today, 9n July 1998 at 9:30 a.m.

BEFORE: HON. JOSEPH A. HALLOCK, A.J.

For the Appellant: Rafael Náter, Esq., Pro Se

For the Agency: Anthonier L. White, Esq.

Court Reporter: Michael T. Kwolek

Proceedings recorded by electronic sound recording.
Transcript produced by transcription service.

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HONORABLE ADMINISTRATIVE JUDGE HALLOCK: Yeah. These mikes -- you've got to be close to the mikes and speak fairly directly into the mike.

MR. WHITE: It came to my attention last week as I was going through the Agency file that the letter of reprimand that we relied on in this case might have been -- there might be a timely issue -- a timeliness issue to that.

And what I mean by that is: the letter of .reprimand was issued in 1995. And according to our regulations, within two years it should be taken from the official personnel file.

Now, the proposal action in this case was initiated in November of '95.

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: Okay. What was the date of the reprimand?

MR. WHITE: October l0th. I believe, October l0th.

MR. NATER: February 10, '95.

MR. WHITE: Oh, no. No. Yeah. February 10, '95 . Which means that --

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: It means it should have been expunged?

MR. WHITE: Right. In 19 --

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: And, therefore, it was error for the Agency to rely upon it?

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ahead.

MR. WHITE: Thank you. It's the Agency's position not to rely on that letter of reprimand.

MR. NATER: Excuse me. Can you repeat that?

MR. WHITE: We're not going to rely on that letter of reprimand.

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: Well, that's what I thought I said.

MR. WHITE: Okay. Right.

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: That's what I thought I -- that's what I thought I said just a moment ago, and I thought you were saying that you had some counter-argument you were going to make.

MR. NATER: So, we can agree with that: you're not going to.

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: So, -- so, therefore, I'll stand by what I said. Your deciding official did state -- did he not? -- that he relied upon that in reaching the decision that he did?

MR. WHITE: That was the first --

HONORABLE ADMINISTRATIVE JUDGE HALLOCK: In the decision order?

MR. WHITE: Right.

ONORABLE ADMINISTRATIVE JUDGE HALLOCK: Did it -- did it not state that he considered that --

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A You mean treated different. by the New York office?
Q Just. a general question. However you felt. Did you feel in any place you were treated differently than the other auditors in the office?
A Well, first in the same office of Puert.o Rico by my own peers I was treated difterent, yes. They had already like a clan. I came with already --
Q Like a what?
A A clan, you know, a group, who had certain ideas of themselves, it was like a closed group so I came from Boston and they didn't like the way Boston was handling their audit.

The first conflict that I received it was the following incident. that happened: I brought. a calendar from the Boston Globe, that's a newspaper from Boston and I have it in my seat, I mean, in my area of working.

When we start having this problem that I complained to Tom Whiting of training of the people of Puerto Rico and the way I understood that the audits should be done and the standards that were applicable and not only the professional standards but also the program's regulations. I mean the education programs were regulated, well, Tom Whiting and Porfirio Rios actually ordered me to take off my Boston Globe calendar from my area and insisted that this office was different and that they didn't want me to

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others but the ones that I have in the top of my head but as I explained you, the people from New York mainly and because this is not one date but it's a period of time, I have to mention Mr, John De Angelo, Mr. John Devlin, that even so I do not have a direct, much direct contact with him but: he wasn't the chief of investigation and I think it was mostly these people but even over John Devlin, Hugh Moynaham, very unfortunately, because I think that he have many other qualities but Hugh Moynaham, Porfirio Rios, and Mike, I mean, not Mike, Eugene Tenor, Tom Whiting, I said John Devlin already, Porfirio Rios and Celia Ruiz were mostly like tools and they were allowing themselves to be part of this circle and they were allowing themselves to be part of this circle and consequently they were discriminating too and t.o a great extent I feel that Celia and Porfirio were mostly a matter of personal envy, personal, professional, "celos", I, don't know how to say "celos" in English but I think envy will be the, the word, professional envy but they were part of the cycle.

Also Maureen Dougherty allowed herself to be involved in this which was very sad to me but she was allowed and she was used by Hugh Moynaham to the extent to manufacture a case against me to justify my removal.

I don't. know exactly who else I can tell you but these are the names that I have stronger in my mind responsible for the whole condition of discrimination and the other

similar in my position, they were, they had started just about the same period that I did and had similar experience, similar background.

Q Okay. But those people you just mentioned, Mr. Nater,

are those people who were promoted actually, did they actually and I believe you answered this earlier, I just want to make sure --

A You what? Can you repeat what you said.

Q I did ask you these questions earlier but I want to make sure I have the right, your answer on the record. These people you just mentioned who were given these promotions, are these people that applied for promotions that you could have applied for and other people could have applied for that were promoted?

A As far as they were applying in the offices of Boston, New York or Philadelphia, I could have applied technically, but actually a distance from my home in Puerto Rico to those places, will have made have to move to those places so don't forget that one of my allegations or the basis for my allegations is that those positions were not being opened in Puerto Rico so not opening in Puerto Rico was the technique to discriminate because if you are opening it in Boston or New York, you know that if I have my family and my daughters in Puerto Rico it's much more difficult and probable for me to apply there.

Attachments to: MEMO: Praying for Certain Amendments to the ISC Order

Attachment A: Report to OSC dated April 14, 1995. Reported, among others, discrimination as described in the report to EEO which was attached and made part of this report to OSC. The EEO report is included in the proposed exhibits for this complaint. Also, reported reprisal as result of filing, among others, a complaint of discrimination.

Attachment B: Report to OSC dated January 20, 1997. As attachment A, above, this report included the report of discrimination.

Attachment C: Report to OSC dated May 20, 1998. As attachment A, above, this report included the report of discrimination.

Attachment D: March 27, 1998 filing appeal with the MSPB of "Four Personnel Actions"; these are the ratings for 1996, and 1997, the suspension for five days, and the removal action. Please note that, under petitioner resonse to question #40 (NOTE), at page 7, petitioner clearly claimed all those actions were the result, among other, of prohibited discrimination against him.

3/2/00	58	MOTION by Rafael Nater for Leave to File reply to defts - oppos to info mot on pending discovery issues (il) [Entry date 03/03/00]
3/15/00	59	ORDER [56-1] motion information Noted. [57-1]opposition response Noted. (signed by Judge Jaime Pieras Jr.) (ni)
3/15/00	60	MOTION by Rafael Nater for Summary Judgment w/stmt, swom stmt. Response due 3/28/00 . (np) [Entry date 03/16/00]
3/15/00	61	MOTION with Memorandum in Support by Richard Riley to Dismiss, and for Summary Judgment w/attchs. Response due 3/28/00 . (np) [Entry date 03/16/00]
3/27/00	62	ORDER granting [58-1] motion for Leave to File reply to defts oppos to info mot on pending discovery issues (signed by Judge Jaime Pieras Jr.) (ni) [Entry date 03/27/00]
4/4/00	63	RESPONSE by Rafael Nater in opposition to [61-1] motion to Dismiss by Richard Riley, [61-2] motion for Summary Judgment by Richard Riley w/attach. (ni) [Entry date 04/05/00]
4/4/00	64	REPLY by Rafael Nater to [57-1] opposition to informative motion on pending discovery issues by Richard Riley (ni) [Entry date 04/05/00]
4/13/00	65	MOTION by Rafael Nater to request order for change in ISCO Response due 4/26/00 . (il) [Entry date 04/14/00]
4/13/00	66	Informative Motion by Rafael Nater re: atty vacation schedule. (il) [Entry date 04/14/00]
4/14/00	67	REPLY by Richard Riley to response to [61-1] motion to Dismiss by Richard Riley, [61-2] motion for Summary Judgment by Richard Riley (ni) [Entry date 04/17/00]
4/19/00	68	MOTION by Rafael Nater for Leave to File reply to deft's motion of 4/14/00 (ni) [Entry date 04/24/00]
4/28/00	69	RESPONSE by Richard Riley in opposition to [65-1] motion to request order for change in ISCO by Rafael Nater (ni) [Entry date 05/01/00]
5/5/00	--	Reply to opp. to change in schedule tendered, by Rafael Nater (ni) [Entry date 05/08/00]